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April 5, 2012

The Honorable Jocelyn Boyd
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Complaint and Petition for Relief of BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Affordable Phone Services, Inc. d/b/a High Tech Communications, Dialtone & More, Inc., Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC, OneTone Telecom, Inc., dPi Teleconnect, LLC and Image Access, Inc., d/b/a New Phone
Docket No. 2010-14-C, Docket No. 2010-15-C, Docket No. 2010-16-C,
Docket No. 2010-17-C, Docket No. 2010-18-C, & Docket No. 2010-19-C

Dear Ms. Boyd:

Enclosed for filing is AT&T South Carolina's Notice of Subsequent Development and Motion for Rescission or Amendment of Decision in the above-referenced matters.

By copy of this letter, I am serving all parties of record with a copy of these pleadings as indicated on the attached Certificate of Service.

Sincerely,

A handwritten signature in black ink that reads "Patrick W. Turner". The signature is written in a cursive, flowing style.

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
1029452

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

In Re: BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a
 AT&T South Carolina v. Affordable Phone Services, Incorporated d/b/a
 High Tech Communications
 Docket No. 2010-14-C

 BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a
 AT&T South Carolina v. Dialtone & More Incorporated
 Docket No. 2010-15-C

 BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a
 AT&T South Carolina v. Tennessee Telephone Service, LLC d/b/a
 Freedom Communications USA, LLC
 Docket No. 2010-16-C

 BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a
 AT&T South Carolina v. OneTone Telecom, Incorporated
 Docket No. 2010-17-C

 BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a
 AT&T South Carolina v. dPi Teleconnect, LLC
 Docket No. 2010-18-C

 BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a
 AT&T South Carolina v. Image Access, Incorporated d/b/a New Phone
 Docket No. 2010-19-C

**AT&T SOUTH CAROLINA’S NOTICE OF SUBSEQUENT DEVELOPMENT AND
MOTION FOR RESCISSION OR AMENDMENT OF DECISION**

BellSouth Telecommunications, LLC d/b/a AT&T South Carolina (“AT&T South Carolina”) respectfully: (a) submits the attached document to inform the Commission of recent legal developments in Texas; and (b) requests that the Commission rescind or amend its decision that when the retail cashback amount exceeds the first month’s price of the service, the Commission-established 14.8% resale discount rate should not be applied to the retail cashback amount.

A. NOTICE OF SUBSEQUENT DEVELOPMENT

Attachment A is a copy of an Order of the Public Utility Commission of Texas, signed April 5, 2012, that concludes that “AT&T Texas’ method for calculating cash back promotional offerings available for resale complies with applicable federal and state law and the terms of the parties’ interconnection agreement.” *See* Attachment A at 1. In that proceeding, a reseller

asserted that AT&T Texas’ method of calculating cash back promotions for resellers violates state and federal law and the terms of the parties’ interconnection agreement (ICA) because AT&T Texas refuses to provide resellers with the same amount of credit that AT&T Texas provides its own retail customers thereby violating the principle that wholesale rates should be less than retail rates. According to [the reseller], AT&T Texas’ calculation creates the opposite effect, which are wholesale rates greater than retail rates.¹

[The reseller] claim[ed] that the wholesale discount percentage of 21.6% (avoided costs) should not be applied to the promotional cash back amount but should only be applied to standard retail prices.

Attachment A at 2. The Texas Commission rejected these arguments and granted AT&T Texas’s Motion for Summary Decision “for the reasons contained in that motion and AT&T Texas’ supporting documentation.” *Id.* at 4.

B. MOTION FOR PARTIAL RESCISSION OR AMENDMENT OF THE COMMISSION’S DECISION

The circumstances in these consolidated dockets are unusual. The Commission has not yet entered an order memorializing its November 9, 2011 vote that when the retail cashback amount exceeds the first month’s price of the service, the Commission-established 14.8% resale discount rate should not be applied to the retail cashback amount. In the five months since that vote, the Kentucky and Texas Commissions have joined the North Carolina Commission in

¹ These are the same arguments the Resellers presented in these consolidated dockets and upon which the Commission apparently relied in its Directive. *See* November 9, 2011 Directive at 2 (“In the case whether the rebate is greater than the first month’s charges, discounting the rebate means that the BellSouth retail customer in effect gets a better price than the CLEC. This is definitely not what we believe the Telecommunications Act of 1996 intended.”).

rejecting the positions the Resellers espoused to this Commission because they are contrary to federal law. Even more significantly, in the five months since that vote, a federal court has carefully considered the very same arguments the Resellers espoused to this Commission and flatly rejected them as being contrary to federal law. As the federal court ruled, AT&T's method "properly makes wholesale discount adjustments to both relevant rates [the monthly price and the cashback amount] *as dictated by the statute*."² In contrast, no other commission or court has accepted the arguments the Resellers presented in these consolidated dockets.

In light of these circumstances, AT&T South Carolina respectfully submits that it is not an efficient use of the Commission's resources to draft and enter a written order supporting a vote, taken five months ago, that is inconsistent with federal law as subsequently applied by a federal court and two state commissions. Instead, AT&T South Carolina respectfully requests that the Commission reconsider and revise its vote to make it consistent with these subsequent developments before issuing a written order in these consolidated dockets. This is appropriate under Section 58-9-1180 which provides, in relevant part, that "[t]he Commission may *at any time*, except in those cases provided for in §58-9-1200, . . . rescind or amend any order *or decision* made by it." (emphasis added). This statutory mechanism is available to the Commission in light of its Directive that §58-9-1200 does not yet apply in these proceedings.³

² See AT&T South Carolina's February 21, 2012 Notice of Subsequent Development, Attachment A at 6 (emphasis added).

³ See December 7, 1011 Directive (dismissing AT&T South Carolina's section 58-9-1200 motion as untimely, without prejudice to any party's right to file such a petition upon issuance of a written order in these consolidated dockets).

CONCLUSION

For the foregoing reasons, AT&T South Carolina respectfully requests that the Commission partially rescind or amend the decision reflected in its Directive of November 9, 2011 and rule that all cashback benefits are subject to the 14.8% resale discount.

Respectfully submitted on this the 5th day of April 2012.



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ATTACHMENT

AReceived: 4-5-12
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La Dore

DOCKET NO. 39028

PETITION OF NEXUS COMMUNICATIONS, INC. FOR POST-INTERCONNECTION DISPUTE RESOLUTION WITH SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A AT&T TEXAS UNDER FTA RELATING TO RECOVERY OF PROMOTIONAL CREDIT DUE	§ § § § § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS
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**ORDER NO. 15
GRANTING AT&T'S MOTION FOR SUMMARY DECISION**

I.

Summary

The Motion for Summary Decision of Southwestern Bell Telephone Company d/b/a AT&T Texas' ("AT&T Texas") is granted and the Motion for Summary Decision and Petition of Nexus Communications, Inc. ("Nexus") are denied. The arbitrators conclude that AT&T Texas' method for calculating cash back promotional offerings available for resale complies with applicable federal and state law and the terms of the parties' interconnection agreement.

II.

Background

On December 28, 2010, Nexus filed a petition against AT&T Texas for failing to calculate the credits on cash back promotions correctly.¹ Nexus filed the petition for post-interconnection dispute resolution pursuant to the Public Utility Regulatory Act (PURA), the Federal Telecommunications Act of 1996 (FTA) and P.U.C. PROC. R. 21.1 – 21.129, P.U.C.

¹ Nexus Communications, Inc.'s Petition for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company d/b/a AT&T Texas under FTA Relating to Recovery of Promotional Credit Due (December 28, 2010).

PROC. R. 22.1 – 22.284, and P.U.C. SUBST. R. 26.1 – 26.469. AT&T Texas filed its response to Nexus' petition on January 7, 2011.²

On August 10, 2011, the arbitrators issued Order No. 10, *Requesting Briefs on Threshold Legal Issue*. In Order No. 10, the arbitrators determined that the threshold legal issue in this docket is:

Does AT&T Texas' method of calculating cash back promotional offerings available for resale comply with all applicable federal and state law and terms of the parties' interconnection agreement?

Nexus' filed its Motion for Summary Decision on September 16, 2011 and filed its Reply Brief on Threshold Issues/Motion for Summary Decision on October 14, 2011. In its Motion for Summary Decision, Nexus asserted that AT&T Texas' method of calculating cash back promotions for resellers violates state and federal law and the terms of the parties' interconnection agreement (ICA) because AT&T Texas refuses to provide resellers with the same amount of credit that AT&T Texas provides its own retail customers thereby violating the principal that wholesale rates should be less than retail rates.³ According to Nexus, AT&T Texas' calculations create the opposite effect, which are wholesale rates greater than retail rates.

Nexus claims that the wholesale discount percentage of 21.6% (avoided costs) should not be applied to the promotional cash back amount but should only be applied to standard retail prices. Nexus argued that the formula that should be used by AT&T Texas to calculate the wholesale price associated with special sales or promotions is the standard retail price subtracted by the full cash back promotional amount subtracted by the avoided costs (wholesale price = (retail price – promotional cash back) – avoided costs). In Nexus' formula, avoided costs are calculated by multiplying the standard retail prices by the wholesale discount percentage (the promotional discount is not reduced by avoided costs).⁴

On September 16, 2011, AT&T Texas filed its Motion to Dismiss and filed its Response to Nexus' Brief on Threshold Issue/Motion for Summary Decision on October 14, 2011. AT&T Texas avers that the parties' ICA, which incorporates the resale provisions of the Federal Telecommunications Act (FTA), provides that “[f]or promotions of more than 90 days, [AT&T]

² AT&T Texas' Response to Nexus Communications, Inc.'s Petition for Post-Interconnection Dispute (January 7, 2011).

³ Nexus Communication's, Inc.'s Brief on Threshold Issues/Motion for Summary Decision at 1 (September 16, 2011).

⁴ *Id.* at 14-16.

Texas will make the services to [Nexus] available at the avoided cost discount from the promotional rate.”⁵ AT&T Texas asserts that this provision was interpreted in the *Bell South Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 441 (4th Cir. 2007) (*Sanford*) case. AT&T Texas goes on to say that in *Sanford*, the Fourth Circuit held that “the price lowering impact of any ...90-day-plus promotions on the real tariff or retail list price [must] be determined and ...the benefit of such a reduction [must] be passed on to resellers by applying the wholesale discount to the lower actual retail price.” AT&T Texas applies the wholesale discount of 21.6% both to the amount Nexus pays for the underlying service and to the retail value of any cash back credit. The formula used by AT&T Texas to determine the wholesale retail price on a promotional offering over 90 days is: wholesale price = [retail price – (avoided costs X retail price)] – [promotional cash back – avoided costs X promotional cash back)].⁶

AT&T Texas explained that in the FCC’s *Local Competition Order*, the FCC stated that avoided costs for incumbent local exchange carriers’ (ILECs) services should be calculated by taking the portion of a retail price that is attributable to avoided costs by multiplying the retail price by the discount rate. AT&T notes that the FCC further stated in this order that when a promotion, like the cash back promotion at issue in this docket, is extended to resellers, the “retail price” by which the discount percentage is to be multiplied is the promotional retail price. The FCC ruled that a promotional offering that lasts longer than 90 days is not short-term “and must therefore be treated as a retail rate.”⁷

AT&T Texas asserts that even though the terms of the parties’ ICA and federal law are unambiguous, Nexus claims that it is entitled to receive the full retail amount of any cash back promotion even though it is not an end user, but a reseller that purchases AT&T Texas’s services at wholesale prices for resale to its own end users.⁸

⁵ *AT&T Texas Motion for Summary Decision* at 4 (September 16, 2011).

⁶ *Id* at 4-5.

⁷ *Id* at 6-7.

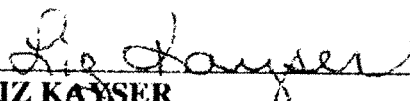
⁸ *Id* at 5.

III.
Ruling

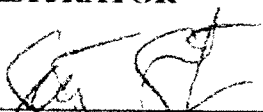
The Arbitrators find that AT&T Texas' motion should be granted for the reasons contained in that motion and AT&T Texas' supporting documentation. All pending requests for relief of Nexus are hereby denied and this case is dismissed without prejudice.

SIGNED AT AUSTIN, TEXAS the 5th day of April, 2012.

PUBLIC UTILITY COMMISSION OF TEXAS



LIZ KAYSER
ARBITRATOR



SCOTT SMYTH
ARBITRATOR

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PUC DOCKET NO. 39028, ORDER NO. 15

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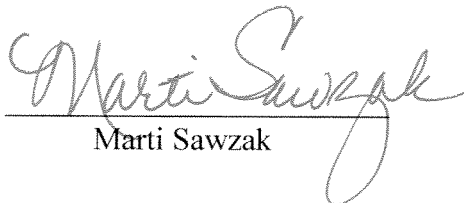
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